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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LAMONT BOURGEOIS, Defendant and Appellant.	A097358 (Sonoma County Super. Ct. No. SCR30748)
THE PEOPLE, Plaintiff and Respondent, v. ROBERT AMOSIS MORGAN, Defendant and Appellant.	A098013 (Sonoma County Super. Ct. No. SCR30748)

A jury found appellant Michael Lamont Bourgeois guilty of two counts of second degree burglary. The same jury found appellant Robert Amosis Morgan guilty of one count of second degree burglary and he pled guilty to a second count. (See Pen. Code,[1] § 459.) Bourgeois received a term of three years eight months in state prison; Morgan was sentenced to three years. In this consolidated appeal, Bourgeois and Morgan each contend that the trial court erred by denying their *Wheeler/Batson*[2] motions. We affirm the judgments.

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

I. FACTS

On March 12, 2001, two Petaluma jewelry stores were burglarized by four men. Vehicles containing appellants Michael Lamont Bourgeois and Robert Amosis Morgan were both stopped by police near the stores. Morgan was arrested at that time; Bourgeois fled from police only to be apprehended later in Southern California.

In May 2001, Bourgeois was charged by information with two counts of commercial burglary. (See § 459.) The information also alleged that he had been committed to state prison for two burglaries committed in 1992 and 1993. (See § 667.5, subd. (b).) Bourgeois pled not guilty and denied the prior conviction allegations. In July 2001, Morgan was charged by information with the same two offenses. (See § 459.) He also entered a not guilty plea. In September 2001, the two cases were ordered consolidated for trial. In October 2001, a consolidated information was filed and the case was tried to a jury.

During jury selection, Bourgeois challenged the prosecutor's exercise of her peremptory challenges. He argued that three men of color had been questioned as prospective jurors—Jurors Nos. 222,[3] 787 and 968—and two of them—Jurors Nos. 222 and 968—had been excused by the People. Bourgeois asked that the prosecutor be required to state her reasons for excluding these two men. He sought to preclude the prosecution from removing Juror No. 968. Morgan joined in the motion.

The trial court did not rule on whether Bourgeois and Morgan made a prima facie showing of discrimination. Instead, the prosecutor launched into an explanation of her use of peremptory challenges. As to Juror No. 222, the prosecutor stated that she did not hear anything objectionable when she questioned him. She challenged him because he had been leaning over with his arms folded, rocking back and forth in his seat, "looking at [her] and almost smiling . . . almost as if he was laughing at" her. This gave the prosecutor a "very uncomfortable" feeling about

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[3] The record does not reveal the actual number assigned to this juror, but we apply a random number for clarity.

him. Bourgeois argued that Juror No. 222 was an African-American man who gave unremarkable answers to questions and appeared to her to be a pleasant person. He did not seem to be laughing at anyone as far as Bourgeois's counsel could tell. Morgan joined in this argument.

As to Juror No. 968, the prosecutor did not believe that he was an African-American—he appeared to her to be Indian. He made her uneasy because of his occupation and his courtroom demeanor. He worked in the drug treatment field. Juror No. 968 appeared to the prosecutor to be "fidgety" and would not make eye contact with her. He appeared to be "very nervous and unsure of himself." She did not have a good sense about him, but denied that her uncertainty had anything to do with "the color of his skin." He did not look comfortable with himself and the prosecutor did not feel comfortable with him.

Morgan noted that Juror No. 968 was challenged after having been twice passed by the People. The prosecutor countered that she was not required to remove a juror immediately. She had noticed his discomfort on the first day of voir dire and wanted to see how he seemed the following day. He looked to her to be as "unsure of himself and nervous" on the second day as he did on the first, so she exercised her peremptory challenge against him.

Finally, the prosecutor stated that she was comfortable with the third man of color—Juror No. 787—who had been called to serve. He made eye contact with her and she liked him. She told the court that she would not be challenging him as a juror and he was impaneled later that day. She defended her reasons for excluding the other two men as valid and denied that her decision was based on race. The trial court ruled that Bourgeois and Morgan had not made a sufficient showing to warrant the granting of their motion. The *Wheeler/Batson* motion was denied, although the trial court indicated that it would be willing to reconsider its ruling if subsequent exercises of the prosecutor's peremptory challenges made that appropriate.

Ultimately, Bourgeois was convicted of both counts and Morgan was found guilty of a single count of commercial burglary. A mistrial was declared as to the

second count charged against him and Morgan ultimately pled no contest to that charge in exchange for a promise of concurrent sentences. In December 2001, Bourgeois was sentenced to three years eight months in state prison—an upper term of three years for the first offense and a consecutive one-third midterm of eight months for the second burglary. The following month, Morgan was sentenced to three years in state prison—an upper term of three years for the first offense and a concurrent upper term of three years for the second offense.

II. EXERCISE OF PEREMPTORY CHALLENGES

A. *Constitutional Requirements*

On appeal, Bourgeois and Morgan—both African-American males—contend that the prosecution improperly exercised its peremptory challenges in a racially discriminatory manner to exclude two men of color from the jury. They argue that the trial court erred when it denied their *Wheeler/Batson* motions. Bourgeois further argues that the trial court failed to make an adequate inquiry into the prosecutor's reasons for exercising two peremptory challenges. We analyze these claims against the established law applying to *Wheeler/Batson* motions.

A prosecutor may not use peremptory challenges to remove prospective jurors for group bias—that is, solely because they are members of an identifiable racial group. (*Batson, supra,* 476 U.S. at p. 89 [defendant and prospective juror of same race]; *People v. King* (1987) 195 Cal.App.3d 923, 931.) Instead, peremptory challenges must be based on specific bias—or individual biases related to the peculiar facts or the particular party at trial. (*Wheeler, supra,* 22 Cal.3d at pp. 274, 276-277, fn. 17; *People v. King, supra,* 195 Cal.App.3d at p. 931; see *People v. Fuentes* (1991) 54 Cal.3d 707, 713.) To do otherwise violates a criminal defendant's federal constitutional right to equal protection and his or her state constitutional right to be tried by a jury drawn from a representative cross-section of the community. (See *Batson, supra,* 476 U.S. at p. 89; *Wheeler, supra,* 22 Cal.3d at pp. 265-266, 272; *People v. Turner* (1986) 42 Cal.3d 711, 715-717; see also U.S. Const., 14th Amend.; Cal. Const., art. I, § 16.)

Although there are some variations, the analysis used to detect a constitutional violation is substantially the same whether the federal equal protection right or the state jury trial right underlies the claim of error. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 193, cert. den. *sub nom. Alvarez v. California* (1997) 522 U.S. 829; *People v. Clair* (1992) 2 Cal.4th 629, 652, cert. den. *sub nom. Clair v. California* (1993) 506 U.S. 1063.) Courts use a three-step process to determine whether a prosecutor used peremptory challenges in an improper manner. First, the defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of group bias such as race, thus raising an inference of purposeful discrimination. (*Batson, supra,* 476 U.S. at pp. 96-98; see *Miller-El v. Cockrell* (2003) 537 U.S. ___, ___ [123 S.Ct. 1029, 1035].) To establish a prima facie case, the defendant must show that the persons excluded are members of a cognizable group and that there is a strong likelihood that they are being excluded because of group association. (*People v. Fuentes, supra,* 54 Cal.3d at p. 714.) While the first half of this inquiry is group-oriented, the second permits an individualized analysis. (*People v. Howard* (1992) 1 Cal.4th 1132, 1155, cert. den. *sub nom. Howard v. California* (1992) 506 U.S. 942.)

We begin with the presumption that the prosecutor exercised the peremptory challenge on a constitutionally permissible basis. If the defendant makes a prima facie case of discrimination, that presumption is rebutted and the burden of proof shifts to the prosecutor at the second stage to show, if possible, that the peremptory challenges in question were *not* predicated on group bias. (*People v. Alvarez, supra,* 14 Cal.4th at p. 193; *People v. Clair, supra,* 2 Cal.4th at p. 652; *Wheeler, supra,* 22 Cal.3d at pp. 278, 280-282; *People v. King, supra,* 195 Cal.App.3d at pp. 931-932; see *People v. Hall* (1983) 35 Cal.3d 161, 167.) At this step, the prosecution must offer a race-neutral basis for exercising a peremptory challenge against that juror. (*Batson, supra,* 476 U.S. at pp. 96-98; see *Miller-El v. Cockrell, supra,* 537 U.S. at p. ___ [123 S.Ct. at p. 1035].)

Third, the trial court must determine whether the defendant has met the ultimate burden of proving that the prosecutor engaged in purposeful discrimination. (*Batson, supra,* 476 U.S. at pp. 96-98; see *Miller-El v. Cockrell, supra,* 537 U.S. at p.___ [123 S.Ct. at p. 1035].) Typically, this determination turns on the trial court's assessment of the credibility of the prosecutor's stated reasons. (*Miller-El v. Cockrell, supra,* 537 U.S. at p. ___ [123 S.Ct. at p. 1040]; see *People v. Alvarez, supra,* 14 Cal.4th at pp. 196-197.) If the prosecutor cannot show an absence of purposeful discrimination, then the defendant's prima facie showing becomes conclusive and the presumption of constitutionality is deemed to be rebutted. (*People v. Alvarez, supra,* 14 Cal.4th at p. 193; *People v. Clair, supra,* 2 Cal.4th at p. 652; see *Wheeler, supra,* 22 Cal.3d at p. 282.) If the prosecutor does establish an absence of purposeful discrimination, the presumption of constitutionality is deemed to be reinstated. (See *People v. Alvarez, supra,* 14 Cal.4th at pp. 198-199.) With these principles in mind, we turn to the specific facts of our case.

B. *Juror No. 968*

In order to establish a *Wheeler/Batson* claim, the defendant must establish that the challenged juror was a member of a cognizable group. (*People v. Fuentes, supra,* 54 Cal.3d at p. 714.) It is not clear whether Bourgeois and Morgan did so with regard to Juror No. 968, who appears to have been an Indian male. (See, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1189, cert. den. *sub nom. Box v. California* (2001) 532 U.S. 963 [dispute about racial identity of juror].) An Indian[4] male would likely be considered a member of a cognizable group, but—both at trial and on appeal—Bourgeois and Morgan appear to contend that both Indian and African-American[5] males together constitute a cognizable group of "men of color."

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[4] It is not clear from the record whether this Indian juror's ancestors came from India or were native to American soil.

[5] We note that both Bourgeois and Morgan were African-American.

In order to qualify an asserted group as cognizable, the defendant must show both that its members share a common perspective arising from their life experience in the group and that no other members of the community are capable of adequately representing the perspective of that group. Members of a cognizable group gain a perspective—a common social or psychological outlook on human events—precisely because they are members of that group. (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98.) Applying this standard, it is not clear that "men of color" constitute a cognizable group within the meaning of *Wheeler/Batson*. (See, e.g., *People v. Ortega* (1984) 156 Cal.App.3d 63, 71 [Indian woman was not member of Hispanic cognizable group].)

We need not determine this issue, however, because the prosecutor stated a basis of specific bias with regard to Juror No. 968. The prosecutor told the trial court that she exercised a peremptory challenge against this juror inter alia because he was employed as a drug treatment counselor. During voir dire, this juror stated that he was a psychologist. Excluding jurors on the basis of their employment is a recognized example of specific bias that justifies an exercise of a peremptory challenge. (See *People v. Landry* (1996) 49 Cal.App.4th 785, 791; see also *People v. Trevino* (1997) 55 Cal.App.4th 396, 411-412 [mental or physical health care]; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315 [caregivers and teachers].) An educational background in psychiatry or psychology or employment in a similar profession has been held to form a race-neutral basis for exercise of a peremptory challenge. (*People v. Landry, supra,* 49 Cal.App.4th at pp. 790-791; see *People v. Barber* (1988) 200 Cal.App.3d 378, 394 [kindergarten teacher].) On this record, we conclude that the trial court could properly have found that the exercise of a peremptory challenge against Juror No. 968 was based on specific bias, rather than group bias. Thus, the trial court properly denied the *Wheeler/Batson* motion with regard to this juror.

C. *Juror No. 222*

There is no question that Juror No. 222 was a member of a cognizable group. (See *People v. Fuentes, supra,* 54 Cal.3d at p. 714.) Bourgeois identified Juror No. 222 as an African-American and the prosecution did not dispute this. African-Americans are a cognizable group for *Batson* and *Wheeler* purposes. (*People v. Alvarez, supra,* 14 Cal.4th at p. 193; *People v. Clair, supra,* 2 Cal.4th at p. 652.)

In this case, the record reveals only one other juror who also falls within the cognizable group of African-American males—Juror No. 787. This juror was not challenged by the prosecution, but actually served on the jury. However, the sole exclusion of Juror No. 222 as only one of several members of a cognizable group can nonetheless constitute a *Wheeler/Batson* constitutional violation if he was improperly excluded. (See *People v. Silva* (2001) 25 Cal.4th 345, 386; *People v. Montiel* (1993) 5 Cal.4th 877, 909, cert. den. *sub nom. Montiel v. California* (1994) 512 U.S. 1253; *People v. Fuentes, supra,* 54 Cal.3d at p. 716 fn. 4.) Thus, the motion was proper even if he was the only African-American male against whom the prosecutor exercised a peremptory challenge that might have been based on group bias.

In order to establish a prima facie case, the defendant must raise a strong likelihood or a reasonable inference that a prosecutor excluded a prospective juror on the grounds of race or other cognizable group association. (*People v. McDermott* (2002) 28 Cal.4th 946, 969-970, cert. pending, No. 02-8810, petn. filed Jan. 28, 2003; *Wheeler, supra,* 22 Cal.3d at p. 281; see *People v. Box, supra,* 23 Cal.4th at pp. 1187-1188 & fn. 7.) In this case, the trial court did not expressly state whether or not Bourgeois and Morgan made a prima facie case that the prosecutor acted based on group bias, nor did it invite the prosecutor to state her reasons for the peremptory challenges. When the prosecutor offers justifications before the trial court makes a finding about whether the defendant has established a prima facie showing and the trial court considers those justifications in ruling on the *Wheeler* motion, the issue of whether a prima facie case was established becomes moot. In these circumstances such as in the case before us, the trial court had no opportunity to rule on the prima

facie showing issue, so the issue on appeal becomes the adequacy of the prosecutor's justifications. (*People v. Sims* (1993) 5 Cal.4th 405, 429, cert. den. *sub nom. Sims v. California* (1994) 512 U.S. 1253; see *People v. Montiel, supra,* 5 Cal.4th at p. 910 fn. 8.) Thus, we find the issue of whether Bourgeois and Morgan met their initial burden of raising a reasonable inference of racial discrimination with regard to Juror No. 222 to be moot.

Once the defendant has made a prima facie case, the burden of producing evidence shifts to the prosecution to offer an explanation for the peremptory challenge that is race-neutral and related to the particular case being tried. (*Purkett v. Elem* (1995) 514 U.S. 765, 767; *People v. McDermott, supra,* 28 Cal.4th at p. 970; *Wheeler, supra,* 22 Cal.3d at pp. 281-282.) In this case, the prosecutor admitted that nothing about the responses Juror No. 222 made to her questions was objectionable. It was his demeanor that caused her concern—he seemed to be laughing at her and this made her quite uneasy. A juror's demeanor forms a proper reason for the exercise of a prosecutor's peremptory challenges—a reason that demonstrates specific bias, rather than impermissible group bias. (See, e.g., *People v. Chambie* (1987) 189 Cal.App.3d 149, 158-159 [juror demeanor].) A prosecutor may consider subjective factors such as body language that legitimately inform the decision to exercise peremptory challenges. (*People v. Arias* (1996) 13 Cal.4th 92, 136, cert. den. *sub nom. Arias v. California* (1997) 520 U.S. 1251; *People v. Montiel, supra,* 5 Cal.4th at p. 909.) Peremptory challenges are properly made in response to bare looks by a prospective juror. (*People v. Turner* (1994) 8 Cal.4th 137, 171, cert. den. *sub nom. Turner v. California* (1995) 514 U.S. 1068.) The prosecutor's explanation need only identify a facially valid race-neutral reason why the prospective juror was excused. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122, cert. pending, No. 02-8214, petn. filed Dec. 31, 2002.) In our case, the prosecutor cited a facially race-neutral reason for excluding Juror No. 222.

Once the prosecution tenders a race-neutral explanation, the trial court must decide whether the defendant has met the ultimate burden of proving purposeful

racial discrimination. (*Purkett v. Elem, supra,* 514 U.S. at pp. 767-768; see *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1051, cert. den. *sub nom. Dunn v. California* (1996) 518 U.S. 1022.) It does so by determining whether the prosecutor's stated reasons were bona fide rather than sham excuses. (*People v. Turner, supra,* 8 Cal.4th at p. 165.) The trial court must assess whether the reasons stated by the prosecutor were genuine—that is, whether they connected specific prospective jurors to the facts of the case and were not mere surrogates or proxies for group membership. (*People v. Alvarez, supra,* 14 Cal.4th at p. 197.)

On appeal, Bourgeois and Morgan argue that the prosecutor's reasons were not genuine, but were a pretext for group bias. They reason that when a peremptory challenge has been upheld based on subjective factors such as those cited by the prosecutor in this case, other more concrete factors were present in the cases to support the denial of the *Wheeler* motion. The trial court evaluates whether a facially valid justification is persuasive when it makes the ultimate determination of whether the defendant has proven purposeful discrimination warranting the granting of the motion. At this last stage, an implausible or fantastic justification may—indeed, probably will—be found to be a pretext for purposeful discrimination. (*Purkett v. Elem, supra,* 514 U.S. at pp. 767-768.) In this case, the trial court impliedly found the prosecutor's reason to be genuine when it concluded that the evidence was not sufficient to grant the motion—i.e., that Bourgeois and Morgan had not met their burden of proving that the prosecution's exercise of a peremptory challenge against Juror No. 222 constituted purposeful racial discrimination. (See *id.* at p. 767.)

Bourgeois and Morgan also urge us to conclude that the subjective nature of the prosecutor's reasoning about Juror No. 222 should have prompted a trial court inquiry. In this matter, the trial court heard the defendants' prima facie case and the prosecution's facially race-neutral reason for excluding this juror, then stated that "[a]t this time . . . , based on what's happened so far, [it] would not seem enough to grant a motion. We'll see what happens [during] the rest of the trial." On appeal, Bourgeois goes so far as to urge that their convictions are reversible based on the

trial court's perceived lack of inquiry alone. Bourgeois and Morgan argue that the trial court did not engage in a "sincere and reasoned" evaluation of the prosecution's reasons. (See *People v. Silva, supra,* 25 Cal.4th at p. 385 [trial court duty to make sincere and reasoned attempt to evaluate prosecutor's reasons and to clearly express its findings].)

Although the trial court's findings were brief, we do not consider its statement to lack a "sincere and reasoned" evaluation of the persuasiveness of the prosecution's race-neutral reason. Based on our review of the *Wheeler/Batson* motion in the overall context of the voir dire, we read this admittedly terse statement to be consistent with our conclusions—that the trial court rejected the claim that "men of color" constituted a cognizable group, in support of which we have found no case law; that it thus found that only one challenged juror was a member of the cognizable group, i.e., African-American males; and that its attitude of "we'll see what happens" suggests that it accepted as genuine the prosecutor's statement that she intended not to challenge another member of the cognizable group—Juror No. 787—who would serve as a juror on this case.

Under these circumstances, Bourgeois and Morgan had stated a prima facie case as to only one peremptory challenge and it would have been reasonable for the trial court to adopt its "wait and see" approach. If the prosecutor did not later challenge Juror No. 787, then the trial court was satisfied that the reason stated for exclusion of Juror No. 222 was bona fide. If Juror No. 787 was later the subject of the prosecution's peremptory challenge, then the trial court would be able to reconsider its finding as to Juror No. 222 at the same time that it considered an expected-*Wheeler* motion as to Juror No. 787, as well. Thus, the trial court's brief ruling reflects a "sincere and reasoned" evaluation.[6]

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[6] In light of this ruling, we need not address the comparative juror analysis put forth by Morgan. (See *People v. Montiel, supra,* 5 Cal.4th at p. 909; see also *People v. Ervin* (2000) 22 Cal.4th 48, 76, cert. den. *sub nom. Ervin v. California* (2000) 531 U.S.

The fact that one member of the cognizable group of African-American males—Juror No. 787—survived a peremptory challenge and ultimately served on the defendant's jury is not conclusive, but it indicates good faith in exercising peremptory challenges and thus is an appropriate factor for the trial court to consider when ruling on a *Wheeler* motion. (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1122; *People v. Turner, supra,* 8 Cal.4th at p. 168; see, e.g., *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690.) Considering all these circumstances, we are satisfied that the trial court properly denied the *Wheeler/Batson* motion as to Juror No. 222.

The judgments are affirmed.

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Reardon, J.

We concur:

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Kay, P.J.

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Rivera, J.

842; *People v. Jackson* (1996) 13 Cal.4th 1164, 1197, cert. den. *sub nom. Jackson v. California* (1997) 520 U.S. 1216.)